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Provocative, Human, Eclectic

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From the President

An Honor and a Privilege

Frank H. Wohl

This is my final column as President of the Federal Bar Council.

It has been a great honor and privilege for me to serve this wonderful organization as its president. I am very grateful to the many judges of the federal courts in the Second Circuit who have participated in Council events over the past two years. I must also acknowledge the advice and counsel on innumerable matters, large and small, provided me during my tenure by many officers and directors of both the Federal Bar Council and the Federal Bar Foundation, especially my immediate predecessor as President of the Council, Bob Giuffra. Of course, much of the Council's work over the past two years was accomplished by the Council's committees, notably the Council's Nominating Committee, chaired by Past President Bob Fiske; its Awards Committee, chaired by Past President Joan Wexler; its Second Circuit Courts Committee, led by Mary Kay Vyskocil; the Public Service Committee chaired until this year by Jamie Levin and now led by Lewis Liman; the Program Committee, chaired by David Pitofsky; the Membership Committee, taken over this year by Tracy Richelle High; the First Decade Committee, chaired by Larry Dany in 2011 and Robin Nunn in 2012; the Westchester Committee chaired by Russell Yankwitt; the Connecticut Committee chaired by David Slossberg; and the Central Islip Committee chaired by Anton Borovina. The Council is also indebted to the editors of the *Federal Bar Quarterly*, led by Co-Editors-in-Chief Bennette Kramer and James Bernard and Managing Editor Steven Meyerowitz, who have worked hard to create an informative and interesting publication every quarter.

Certainly, one of the most extraordinary experiences of my term has been the opportunity to represent the Council in presenting its awards to six extraordinary recipients. In 2011, I had the great honor of presenting the Learned Hand Award for excellence in federal jurisprudence to Justice John Paul Stevens. This year, it was my equally great privilege to present the Hand award to our own circuit's Judge Robert A. Katzmann. In 2011, I was privileged to represent the Council in presenting New York City Corporation Counsel Michael A. Cardozo with the Emory Buckner Award for outstanding public service. This year, I had the honor of presenting that award to United States Attorney for the Eastern District of New York Loretta Lynch. In 2011, I was very pleased to present the Whitney North Seymour Award for outstanding public service by a private practitioner to William F. Plunkett of McKenna Long & Aldridge. This year, it was my great pleasure to present that award to Patricia Hynes of Allen & Overy. We are all indebted to the Council's Awards Committee, chaired by Past President Joan Wexler, for its guidance and wisdom in recommending these outstanding award recipients.

I cannot let my term expire without acknowledging the extraordinary dedication of our Executive Director Jeanette Redmond, who has completed 10 years with the Council. During her decade of service to the Council, under six different presidents, Jeanette has shepherded the organization through enormous growth. Membership has more than doubled from approximately 1,600 to over 3,700 members. While maintaining the Council's signature events — the Thanksgiving Luncheon, the Law Day Dinner and the Winter Bench & Bar Conference — the last decade has seen major innovations, such as creation of the extraordinarily popular Federal Bar Council Annual Fall Bench & Bar Retreat; development of an expanded array of CLE programs; establishment of the First Decade Committee for younger lawyers; additional receptions honoring judges, law clerks and legal interns; and the inception of brown bag lunches with judges and members of the First Decade Committee. This rich array of activities would simply not be possible without the highly dedicated Federal Bar Council staff, under Jeanette's very effective leadership.

I am sure that, under my successor, Bob Anello, the Council will continue to thrive. Bob is a

leader of the bar, long active in many bar and other public service activities. In addition, the Long Term Planning Committee has been revived under Past President Steve Edwards. We are also looking forward to the establishment of the new Federal Criminal Practice Committee, under Committee Chair Don Buchwald, and the Council is planning a variety of less formal group activities to be based on members' expressions of interests. The Council staff is also in the process of implementing social media facilities to support these activities and to allow members to more easily communicate with one another and with the Council.

Today the kinds of direct personal interactions among colleagues at the bar that are fostered by Federal Bar Council activities are more valuable than ever. While advocacy in litigation is a scholarly endeavor, it also has an important interpersonal element. Great arguments do not succeed if they do not resonate with other people — judges, jurors or adversaries. I recall Judge Milton Pollock of the Southern District explaining that his reason for requiring lawyers to attend pre-motion conferences was that lawyers would write arguments in papers that they would never present to his face. I suspect that, in our era of rapid fire emails and conference calls in place of meetings, we can do a better job of representing our clients if our relationships with the judges and lawyers whom we hope to persuade includes personal interaction — if we have seen them before and if we expect to see them again. The Council, through its broad array of professional activities, enhances our abilities to serve our clients and to contribute to the improvement of the judicial process.

I look forward to continuing, as President Emeritus, to support the Council's unique contribution to the legal community of the Second Circuit.

From the Editor

Work and Family

By Bennette D. Kramer

This summer the *Atlantic* published an article by Anne-Marie Slaughter entitled "Why Women Still Can't Have It All" that sent shock waves through the ranks of women lawyers. Slaughter's position was often interpreted to mean that women cannot successfully work and have children. However, I think that it means instead that women need to be realistic when defining career goals and cannot pursue their careers as if they did not or would not have children. This does not mean that women cannot have successful careers, just that they need to take their responsibilities as parents into account as they consider their options.

Slaughter was the first women director of policy planning at the State Department, which was her dream job. The job, however, required her to be in Washington, away from her Princeton home, her 12 and 15 year old sons, and her husband during the week. She was able to pull this off because she had a supportive husband who was willing to step in and give her the chance to take the State Department job. Slaughter left the State Department after nearly two years and went back to her tenured position at Princeton University. She quit after realizing that as a mother she could not devote herself to the advancement and pursuit of her career with the same intensity at all stages of her career or in the same way as her male contemporaries. She missed being around when her children needed her support.

Systemic Changes

Slaughter points to several systemic changes that are necessary to enable more women, particularly working mothers, to reach leadership positions.

The first of these is the culture of billable hours, which Slaughter terms "time macho." The "time macho cult" encourages all employees to work long hours at the office and to be visible at those times. If employees were able to work remotely by computer and telephone, they could leave the office at a reasonable hour to spend time with the family and then pick up necessary work after children have gone to bed.

Slaughter does not recommend that employers treat parents any differently from other workers, because special privileges set

people apart. In her view, employers often assume that working mothers are not as dedicated as other workers even though they often have to be much more organized and have much more endurance than workers who do not have parental duties. Thus, employers must change their assumptions about working parents and other caretakers and provide the flexibility necessary to serve the needs of both employers and parent employees.

Slaughter next points out that our professional careers today have the potential to be longer than they were in the mid-twentieth century when people retired at 67. Life expectancy has risen and men and women in good health can expect easily to work until they are 75. As a result, women should consider their career paths as an arc that climbs for a while and then levels off and climbs again rather than as a straight line upward. Mothers (or fathers for that matter) can make this happen by taking periodic time out, slowing down the rate of promotion or pursuing alternate career paths during parenting years. Taking a career "time out" leads to a career peaking in the late 50s and early 60s, instead of 40s and 50s, which makes sense if careers are going to continue into one's 70s. Employers can take steps to promote acceptance of these alternative career paths by providing automatic extensions to tenure or partnership or promotion paths for all new parents.

Slaughter admitted that she wanted to return home because she was losing irreplaceable time with her teenage sons. She suggests that women in positions of authority or power make the existence of children and their family responsibilities obvious to their co-workers to engender more acceptance of the need to tend to those responsibilities. For example, if a woman makes an effort to get home to have dinner with her family every night, she should not sneak out, but admit that this is an important part of her day.

Slaughter believes that attitude and flexibility would go a long way toward encouraging professional mothers to stay in their chosen careers and achieve a better balance with home responsibilities. In her view, women must be realistic and cannot approach their careers as if they did not have children.

The Legal Profession

How do these suggestions apply to the legal profession? Women lawyers are expected to put in the same long hours as their male colleagues are and to be available at all hours for meetings with clients and senior attorneys. Billable hours are a hallmark of the effort each associate is making. However, women lawyers are leaving firms and the legal profession in droves. The Report of the Sixth Annual Nation Survey on Retention and Promotion of Women in Law Firms issued in October by The National Association of Women Lawyers and The NAWL Foundation found for the first time a slight decline in the percentage of women associates and non-equity partners in the nations' largest law firms. Women equity partners represent barely 15 percent of all equity partners. In contrast, women represent 55 percent of staff attorneys and 34 percent of counsel. This percentage of equity partners has been stable for 20 years. At the same time, as in years past, women do not receive credit as rainmakers, are not proportionately represented in law firm leadership and are compensated less than their male peers. What accounts for this discrepancy? What would work to satisfy the needs of both the legal employer and the working mother (or parent) so that women lawyers remain in law firms and employers' investments in them pays off?

Flexibility is the term that comes up at every juncture — flexibility in hours, flexibility in time for advancement, flexibility to take time off and flexibility to leave work to attend to emergencies. Working parents do not want special favors, but they would like to be able to tend to child needs without feeling guilty or that it is harming their careers. Today, through electronic connections a lawyer can effectively draft briefs, participate in conference calls and even file papers from home. In fact, many of my partners (mostly male) work at home to fulfill parenting obligations. Also, with the exception of client meetings and court appearances, there is no reason a lawyer cannot attend a school

performance, go to a doctor's appointment or have dinner with his or her family, and then make up the time in the evening at home. As long as work gets done, why should it matter when it is done during the course of a day?

Today, through electronic connections a lawyer can effectively draft briefs, participate in conference calls and even file papers from home.

Employers should also consider career path flexibility. As Slaughter suggests, many more women would stay in their chosen professions if they could take time out or cut back on their schedules during intense child rearing periods and then resume the upward career climb when those responsibilities are fewer.

Employer and co-employee attitude is a large part of the future of parents in law firms and corporations. If an employer insists that a lawyer work at his or her desk during certain hours and chalks up mental demerits when that person is absent, the lawyer-parent will feel guilty and will either give up valuable family time or obligations or quit. On the other hand, a welcoming attitude toward flexible hours and work locale will encourage employees to work for an employer. Employer attitudes about parental leave similarly affect the way working parents approach the birth of a child and their employment. Begrudging attitudes create an environment that a new parent may perceive as hostile.

Thus, the best practice for an employer should be to foster flexible hours to enable an employee to fulfill both family and work responsibilities. Also, a liberal leave policy (depending of course on the size and needs of the firm) will encourage lawyer-parents to return to work. A specific support that many lawyer-parents have mentioned as an occasional lifesaver is emergency day care. Larger employers who have entered into contracts with child care providers to supply day care on an emergency basis find that they are serving their own needs as much as their employees.

On the personal side, it is important for young parents, particularly mothers, to set aside time for themselves. Thirty minutes a day to exercise or read or pursue another important activity can make a huge attitude, if not mental health, difference. This time may have to be carved out early in the morning or at night, but it may make a huge difference in the way a woman deals with both family and work responsibilities.

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Finally, a working mother has a much better chance of success in balancing family and work if she has committed support from her partner and, if possible, from an extended family. A spouse or other partner who truly shares family responsibilities can make the difference between success and failure.

In The Courts

Judge Susan L. Carney

By Brian M. Feldman

On June 21, 2011, the Honorable Susan L. Carney entered into duty as a U.S. Circuit Judge for the U.S. Court of Appeals for the Second Circuit. On May 20, 2010, and again on January 5, 2011, President Barack Obama nominated Judge Carney to the court, and on May 17, 2011, the U.S. Senate confirmed the nomination by an overwhelming majority.

Judge Carney fills the vacancy created by Judge Barrington D. Parker, Jr.'s assumption of senior status on October 10, 2009. Judge Carney's seat on the Second Circuit dates back to 1902, when Congress created an additional seat on the court (then just over a decade old), and President Theodore Roosevelt appointed Alfred Conkling Coxe, Sr., to the position. Judge Carney, like Judge Parker before her, assumes a seat previously held by renowned jurists including Ralph K Winter, Jr., Jerome N. Frank, and Robert P. Patterson, Sr.

Like Second Circuit Judge José A. Cabranes, Judge Carney comes to the federal bench following service in the General Counsel's office at Yale University. Judge Carney maintains her chambers in New Haven, Connecticut, along with her colleagues, Second Circuit Judges José A. Cabranes, Guido Calabresi, John M. Walker, Jr., and Ralph K. Winter, Jr.

Judge Carney is devoted to both Harvard and Yale. Judge Carney was born in the shadow of Cambridge, Massachusetts, and attended Harvard College as an undergraduate student of History & Literature, and later, Harvard Law School, where she graduated *magna cum laude* in 1977. Between 1998 and 2011, she served in the General Counsel's office at Yale University in various capacities, including Acting General Counsel, and she immensely enjoyed her time at the university. Her husband, Lincoln Caplan, an author and journalist, is a New Haven native. Judge Carney explains that it is "wonderful to have deep roots in both New Haven and Cambridge."

Judge Carney was born into a tradition of public service, as both of her parents were U.S. Navy veterans. Her mother, from Manchester, New Hampshire, had been a WAVE — what the judge calls a "Rosie the Riveter type" because her mother worked maintaining naval aircraft during World War II. Judge Carney's father, from just outside Boston, joined the Navy as soon as he could enlist. Both of the Judge's parents attended Boston University on the G.I. bill, where they met in the library. Her father became a trial lawyer in Boston, where he practiced law as senior partner in a small firm for many years.

Growing up, Judge Carney was the oldest sibling, with five younger brothers. She attended public schools in Lexington and Weston, Massachusetts, and spent a memorable year abroad, as an exchange student in France, attending a French high school during her junior year. As a youth and through her college years, Judge Carney was a dedicated cellist and musician. She remains a devotee of classical music. Just out of college, she spent a year teaching French and Russian at Phillips Academy in Andover, Massachusetts, and then turned to law school, where she put aside other interests to devote herself to her legal training.

Judge Carney's legal career began with a judicial clerkship in Boston, for Judge Levin H. Campbell of the U.S. Court of Appeals for the First Circuit. Following her clerkship, Judge Carney worked in the private sector in Boston and Washington, D.C., at Ropes & Gray, Rogovin, Huge & Lenzner (formerly Rogovin, Stern & Huge), Tuttle & Taylor, and Bredhoff & Kaiser, and as an independent practitioner. Judge Carney worked both as a litigator and as an attorney handling real estate, transactional, and employment and labor matters.

In addition, in private practice and as counsel at Bredhoff &

Kaiser, Judge Carney developed expertise with institutional clients, such as Georgetown University and the George Washington University. From Bredhoff & Kaiser, she moved in-house at the Peace Corps, also in Washington, where she worked until joining Yale in 1998.

Yale provided Judge Carney with broad exposure to a wide range of legal issues that practicing attorneys encounter. Counseling Yale, in Judge Carney's experience, was akin to helping to advise a small town. That characterization is a typical illustration of Judge Carney's modesty: Yale is an institution of 22,000 people with an endowment of approximately $20 billion dollars. In truth, Judge Carney helped counsel a substantial municipality with funds exceeding the gross domestic product of many nations.

Judge Carney had a uniquely diverse practice in the General Counsel's office at Yale. Her portfolio spanned criminal, civil, regulatory, and ethical matters. On the criminal side, she counseled Yale on preventing misconduct in the university's administration of federal programs, such as Medicare, Medicaid, and research grants. Her civil portfolio included intellectual property, litigation, ethics, industry-wide collaborations and alliances, and health care matters including clinical research trials. In addition, Judge Carney counseled the university on more arcane matters, such as laws governing geothermal well installations and art law. The Judge truly enjoyed the diversity of work she handled at Yale.

Judge Carney's diverse practice at Yale translates well to the Second Circuit, where she now hears cases across the spectrum of legal issues. After decades of advising clients and institutions, Judge Carney has a sophisticated understanding of the impact of judicial rules on lawyers and their clients. This background gives Judge Carney a pragmatic perspective on jurisprudence, with a heightened sensitivity to the real world consequences of judicial decisionmaking. Judge Carney takes to heart the admonition of her colleague, Second Circuit Judge Pierre N. Leval, that "easy cases make bad law," because unnecessarily broad pronouncements are more likely to appear in easy cases with obvious outcomes.

Judge Carney has been thrilled with her experiences on the Second Circuit. Before joining the court, she knew the court maintained a great tradition of excellence and independence. As a member of the court, Judge Carney has been privileged to discover that the Second Circuit is a "delightfully" collegial institution and that "the superlative quality of the judging is matched by the warmth and collegiality" of her fellow jurists.

Judge Carney appreciates the court's tradition of permitting oral argument, which adds a "very human" dimension to the process and gives litigants the important knowledge that their arguments are being heard and considered. She also appreciates the court's limitations on the length of oral arguments. Judge Carney believes these limitations force counsel to distill their arguments, and ensures that judges focus on the difficulties they may have with counsel's positions.

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In sum, as Senator Lieberman noted upon Judge Carney's confirmation by the Senate, the Judge's "legal acumen and long career of devoted public service, impeccable integrity and sterling character make her a valuable addition to the federal bench." Senator Blumenthal and former Senator Dodd echoed this praise, with Senator Blumenthal noting Judge Carney's "distinguished record of respect for legal principles," and then-Senator Dodd stating that, "[t]hroughout her career, including as the Deputy General Counsel at Yale University and as a former Associate General Counsel for the Peace Corps, she has demonstrated her strong commitment to the rule of law." In addition to these excellent qualities, Judge Carney brings the perspective of a practitioner experienced in a broad ar-

ray of legal issues. Judge Carney and her uniquely grounded perspective are a wonderful addition to the Second Circuit.

Law and Literature

The Case of Ephraim Tutt

By Molly Guptill Manning

Ephraim Tutt was one of the most famous and beloved lawyers of the twentieth century. For decades, Arthur Train — a former New York County assistant district attorney — was Tutt's Boswell, chronicling Tutt's legal adventures and publishing them in books and magazines such as the *Saturday Evening Post*. From the first story published in 1919, lawyers and laymen could not get enough of Tutt's brand of justice. They admired Tutt's principles of never turning down a case, and representing any client — regardless of his or her ability to pay a fee — who faced an injustice. While Tutt was kind hearted, caring, and devoted to helping those in need, he was known in court as a formidable adversary, delivering sharp and discerning arguments, and employing his quick wit and clever tactics to ensure a just result. "Leave old Tutt alone" was considered sage advice.

Winning Cases

Beginning with Train's first report about a gripping murder trial Tutt had won in New York State Supreme Court, the public yearned for more stories about this remarkable attorney. Driven by his conscience, faith in humanity, and dedication to the principle of justice, Tutt humanized the law for the masses and demonstrated that the legal profession could be a noble calling. But, the public was not the only audience Tutt had captivated. Attorneys were also fascinated by Tutt — he inspired many people to go to law school and to practice as he did. In fact, lawyers who read Train's stories — which included case citations and a full description of the legal principles involved — reported their success after applying Tutt's arguments to their own cases.

Nearly two decades after Train's first Tutt story, he published *Mr. Tutt's Case Book*, which consisted of Train's descriptions of Tutt's cases, citations to the legal precedent relied upon, and legal commentary. The book was well received by students and practitioners of law. In fact, by the 1940s, Tutt had become such an authority that Harvard Law School's Elihu Root reading room had a dedicated shelf for all of Train's books on Tutt, and the publisher of *Mr. Tutt's Case Book* received frequent requests from lawyers and judges for copies of the book for their libraries.

Ephraim Tutt had become a household name. It was said that he was more widely known than any Justice of the United States Supreme Court, and Tutt had become so famous that even celebrities were envious of his renown. Train once estimated that Tutt had "figured in 300,000,000 separate copies of *The Saturday Evening Post*," and in hundreds of thousands of books published under his name. In addition, Train wrote a script for a Broadway play about Tutt, there was a radio program in which actors reenacted Tutt's cases, and in the 1950s Tutt even had his own television program. However, as Tutt's popularity grew, Train's health declined. Feeling that Tutt deserved to be known by the public in a more meaningful way than merely by his courtroom battles, Train worked to have Tutt publish an autobiography.

A Best Seller

In 1943, *Yankee Lawyer: The Autobiography of Ephraim Tutt* was published by Charles Scribner's Sons. The book was an immediate best seller. Book reviews in leading newspapers praised the book — and many of Tutt's reviewers expressed delight and relief that Tutt had finally written an account of his own. Train reviewed *Yankee Lawyer* in the *Yale Law Journal*, explaining Tutt's reluctance to publish the story of his own life, but how the finished book was a glowing testament to the spirit in which Tutt had practiced law for so many years.

Although many had previously believed that Tutt was a fiction of Train's creation, the publication of Tutt's autobiography convinced a legion of Tutt fans of their hero's existence.

Letters poured into the mailbox of Charles Scribner's Sons from admirers requesting Tutt's autograph, readers wishing to settle sundry bets made on whether Tutt was real, librarians seeking clarity on how to catalog the book, a federal judge seeking assistance with a dispute pending before him over whether the book was fiction or nonfiction, and lawyers wishing to consult with Tutt over vexing legal matters. Confusion ran rampant, and it only magnified when *Yankee Lawyer* was shipped around the world to American soldiers fighting during World War II. Letters from jungles, remote outposts, and those in the thick of fighting were mailed to Tutt, thanking him for setting an ideal worth fighting for.

It was said that Tutt was more widely known than any Justice of the United States Supreme Court, and Tutt had become so famous that even celebrities were envious of his renown.

Nearly six months after the book was published, an astonishing article appeared in the *Saturday Evening Post*, in which Train claimed to be the true author of *Yankee Lawyer* and boldly proclaimed that Tutt was a mere fiction. This revelation was no small matter; leading newspapers such as the *New York Times* considered the issue front page news. Tutt's admirers rejected Train's claim and defended Tutt's actuality, and emotions ran high as many people valued Tutt for his ethics and principles and marveled at how such a character could be a sham. One attorney grew so incensed over the matter that he sued for fraud, arguing that if *Yankee Lawyer* was written by Train, the book was liable to fool the thousands of readers who read it under the auspices of being non-fiction. This attorney, Lewis Linet, sought monetary damages in the form of a refund for the cost of the hoaxing book, as well as injunctive relief to prevent the book's continued publication so long as it purported to be an "autobiography" of Ephraim Tutt. The named defendants — Arthur Train, Maxwell Perkins (Train's editor) and Charles Scribner's Sons — hired the "lawyer's lawyer" John W. Davis to represent them in New York State Supreme Court. Despite Davis's stature in the profession, the *Hartford Courant* lamented "[o]ne can only wish that the author would call upon Ephraim Tutt to handle the brief…filed in his defense."

After reading of Tutt's legal cases for decades, the public could not help but follow closely the lawsuit that seemed to threaten Tutt's reputation as a pure-hearted servant of justice. If the book was declared a fraud it would undermine the confidence and trust that the public had gained for the profession through the Ephraim Tutt stories. As his legal troubles mounted, Train remarked that he felt he was in good company with Pygmalion and Frankenstein — the one had created a sculpture that he loved so dearly that it came to life; the other conceived a homicidal monster he was unable to control. "I have had the similar experience of seeing a character of my own become infused with unexpected vitality," Train stated. Train maintained that he was completely astounded by the public's confusion over Tutt's autobiography, believing that he "would as soon have expected the general public to believe him to be an actual person as Little Orphan Annie."

Motion Granted

As for the lawsuit, recognizing that it had the capability of bolstering book sales, Charles Scribner's Sons wrote to John W. Davis, stating that although the case could likely be dismissed outright, the publishing company would allow the lawsuit to languish in court so long as the legal bill did not exceed $3,000. Davis was happy to comply with these terms, and he filed a motion for partial dismissal of the case, arguing that Linet's request for injunctive relief was meritless because monetary relief would sufficiently soothe any injury flowing from the book's characterization as an "autobiography," and Linet lacked standing to bring this claim on behalf of a class of unidentified readers. Linet

opposed the motion, noting that "[t]he defendants have utilized every deceptive device and every false representation possible to make the book appear to be a genuine autobiography." Linet continued: "We have in this case a question of truth as against falsity. The defendants would make a joke of truth and would honor fraudulent representations by pointing out how well deceived the public were in that they remained blissfully unaware of the deception. A fraud undiscovered is a fraud just as much as one that is discovered." In the end, the motion to dismiss Linet's request for injunctive relief was granted "on the ground that no man could of his own volition constitute himself the champion of the public and demand relief on their behalf."

Train passed away before the remainder of the lawsuit was resolved (it was ultimately settled by stipulation of discontinuance years later). But, before his death, Train published his final Tutt book and included a chapter on the lawsuit over *Yankee Lawyer*. Although Train insisted that he was the author of *Yankee Lawyer* and that Tutt did not exist, he conceded "it is, of course, possible that there is an Ephraim Tutt. Who can tell? My personal denial is not conclusive." For many of Tutt's followers, this little encouragement was sufficient to nurture their continued belief in their beloved old barrister.

Even without his faithful biographer's continued accounts of his practice, Tutt's popularity continued to climb after Train's death. In fact, nearly 20 years after *Yankee Lawyer* was published and Train had passed away, Judge Harold R. Medina of the Second Circuit undertook a project with Train's (or Tutt's) publisher to assemble the greatest Tutt stories ever written. In the introduction to this volume, Judge Medina confided that he had read Train's Tutt stories throughout his legal career — "as the long succession of books of Mr. Tutt stories were published by Charles Scribner's Sons, I read them over and over." Judge Medina explained that, before long, Tutt had become his hero, for Tutt had practiced as most lawyers dreamt they would — "fighting for right and justice, protecting the poor and the helpless, humbling the rich and the powerful, and making the world a better place to live in." What made Tutt so popular, Judge Medina explained, was that "he touches our hearts so closely because he represents the ideal of what lawyers and those who are not lawyers think lawyers ought to do." Tutt impressed upon all who knew of him that the practice of law was not just a money making business, but a profession composed of public spirited servants striving towards justice. As Judge Medina noted, "[e]very lawyer should know that his function in society cannot be fully or properly performed unless he has sympathy for those in trouble and distress and puts his sympathy into action by representing in or out of court those who need the services of a lawyer." For generations, Tutt served as a reminder of these aspirations for the legal profession through his selfless example.

As for the answer to the great question of whether Ephraim Tutt ever existed, perhaps Arthur Train said it best: "If Mr. Tutt did not exist, it would be necessary to invent him."

Editor's Note: Molly Guptill Manning is the author of *The Myth of Ephraim Tutt*, which tells the complete story of Ephraim Tutt's remarkable fictitious legal career and Arthur Train's ingenious literary hoax. She is also a staff attorney at the United States Court of Appeals for the Second Circuit. The views expressed are those of the author and not necessarily those of the Second Circuit.

Legal History

John McCloy in the Second Circuit

By C. Evan Stewart

During his lifetime, John J. McCloy was one of the most famous lawyers in the world. Assistant Secretary of War during WW II, U.S. High Commissioner for Germany in the aftermath of the war, president of the World Bank, Chairman of Chase Manhattan Bank, Chairman of the Council on Foreign Relations, member of the Warren Commission, advisor to numerous presidents (one of "The Wise Men"), McCloy was frequently dubbed the "Chairman

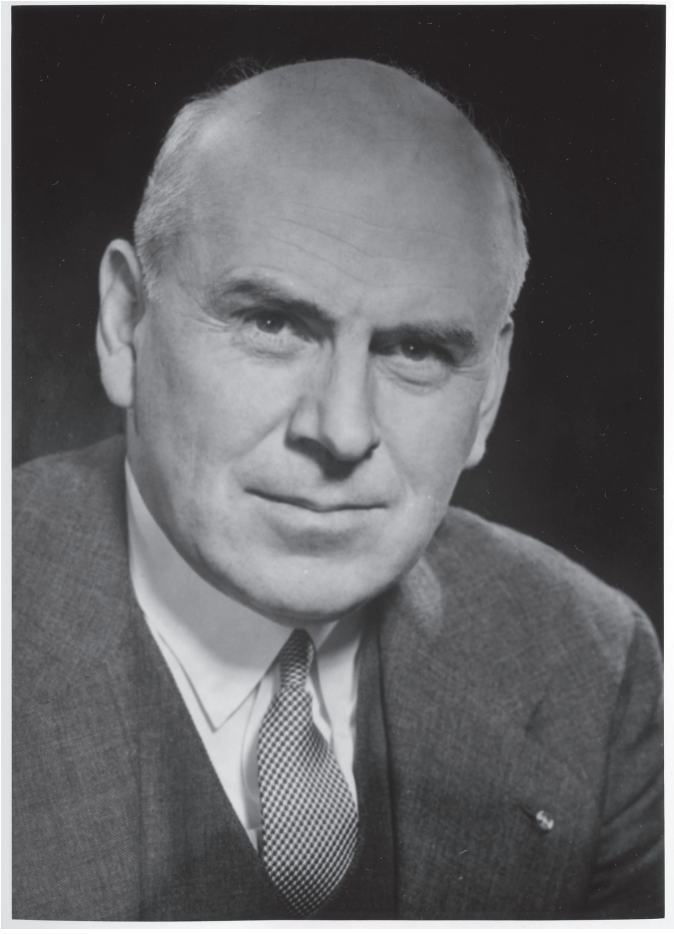
of the American Establishment" by the media. In addition to the foregoing, McCloy was also a name partner in Milbank, Tweed, Hadley & McCloy.

But before McCloy took on any of these formidable roles, as a young lawyer in New York he made all that possible by his dogged pursuit of a fascinating matter: the Black Tom explosion.

Espionage in World War I

In 1914, Count Johann Von Bernstorff arrived in the United States; he was Germany's ambassador. His principal mission was not diplomacy, however. Rather, Von Bernstorff and his staff were here to assist Germany in its efforts to win the Great War (later known as World War I); and to do so by whatever means necessary.

Well-endowed by the German government with millions of dollars, Von Bernstorff undertook numerous nefarious tasks. Where he was most successful (it would appear) was in interfering with the manufacture of explosives and in the sinking of ships filled with cargo to help the Allies. And it is at the intersection of those efforts that led to the Black Tom explosion.



John J. McCloy

Photo courtesy Amherst College Archives and Special Collections

Black Tom Island was a small spit of land in New York Harbor, very close to the Statue of Liberty. On the night of July 30, 1916, the Island was a major munitions dump, chock-a-block full of many tons of TNT, as well as 69 railroad cars with thousands of tons of ammunition; all of this material was to be shipped to England and France. At 2:08 a.m., an explosion the equivalent of a 5.5 Richter scale earthquake occurred. That explosion (and those that followed) were felt 90 miles in every direction. Bullets, shells, and metal fragments were sent flying across the Hudson River; most people were rocked out of their beds; immigrants on neighboring Ellis Island had to be evacuated; windows in Manhattan and Brooklyn were shattered; and the Statue of Liberty sustained serious structural damage (the interior of Lady Liberty's torch has been closed to visitors ever since the explosion). The total property damage was estimated to be $20 million ($427 million in 2012 dollars); miraculously, only seven people died as a direct result of the explosions.

It quickly became apparent that this was no accident. Initially, it was thought that railroad employees were at fault; then, suspicion centered on guards at the pier who had lit smudge pots to ward off mosquitoes. But the official investigations at the time came to naught. Most people believed it was foul play (especially with other, similar incidents later in WW I), but there was no proof. In fact, it was the first major terrorist attack on American soil directed by a foreign sovereign power (not counting the torch-

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ing the British did to Washington during the War of 1812).

The Mixed Claims Commission

After WW I ended, the German-American Mixed Claims Commission was established to resolve war related claims of German and American companies. This process proved to be difficult, because of the large number of disputes put before the Commission, daunting evidentiary issues, and obvious geo-political considerations in the post-war era. As such, matters like the Black Tom explosion went unresolved for quite some time.

In September of 1930, the new head of Cravath, Henderson & de Gersdorff's Paris office, John McCloy, received a cable from New York, directing him to go to The Hague; one of Cravath's clients, Bethlehem Steel, was litigating a claim before the Commission that German agents were responsible for the Black Tom explosion and Bethlehem's millions of dollars of damages. Cravath and McCloy had been brought in to assist because the lawyer of record for a group of companies seeking compensation (including Bethlehem), Amos Peaslee, was hopelessly out of his depth. And after just a few days of attending the hearing, McCloy came to share that view (Peaslee did not have his "ducks all lined up in a row"). Ultimately, Peaslee's case — although he had some pretty damning evidence from confessed German agents (as well as an official German cable authorizing sabotage "in every kind of [U.S.] factory for supplying munitions of war") — proved not to be bullet proof. On November 15, 1930, the commissioners unanimously rejected the claims for damages, with both the German and American commissioners specifically finding that the German agents were "liars, not presumptive, but proven."

McCloy's Obsession

At that point, McCloy took over. Filing an appeal, McCloy went all over Europe in search of evidence, meeting "shady kinds of characters in dives, the worst kind of bars, even houses of ill-repute." Some of those efforts were for naught; others, however, bore fruit. Back in America, a recently discovered message in lemon juice (readable only after the document had been warmed by a steam iron) seemed particularly promising because it tied specific individuals to the Black Tom explosion. McCloy's new evidence moved the bar slightly — his appeal lost, but the Commission's December 3, 1932 ruling was now not unanimous (McCloy got the vote of the American commissioner). And so on he went, even as his law partners began to despair of McCloy's growing obsession.

In 1933, McCloy's doggedness paid off: he discovered (and was able to prove) that Germans (i) had bribed one of McCloy's own handwriting experts on the lemon juice document, and (ii) had bribed other witnesses. On the basis of those developments, the Commission reopened the

John J. McCloy in Panama

Photograph provided courtesy of the World Bank Group Archives

case on December 15, 1933. That then prompted McCloy to dig further.

In Ireland, he was able to get a very helpful affidavit from James Larkin, a radical Irish labor organizer who detailed German sabotage efforts in the United States. In Austria, he smuggled a historian into a military archive to find documents evidencing the German terror campaign. In Germany, he hired detectives to trail suspected individuals and he had telephone calls traced.

By 1936, the German government (spearheaded by Herman Goering and Rudolph Hess) indicated that it would consider settling the matter. In early July, McCloy and a team of lawyers were in Munich negotiating in a "terrifying" environment ("All those goose-stepping soldiers…. I knew then that they were a bunch of thugs."). And while it appeared that a deal had been struck, ultimately it came undone because some of the American companies in the case believed they would be disadvantaged by the settlement (e.g., Chase National Bank) and surreptitiously killed the deal.

So back went McCloy to litigating the dispute before the Commission. Further digging uncovered a very damning document by a German American which tied "pencil bombs" — cigar-sized cases filled with acid in copper chambers; after the acid melted the copper, intense flames would be created (used to ignite the Black Tom explosion) — to the German bad guys.

In 1933, McCloy's doggedness paid off: he discovered (and was able to prove) that Germans (i) had bribed one of McCloy's own handwriting experts on the lemon juice document, and (ii) had bribed other witnesses.

With this last piece of evidence, McCloy had now lined up his ducks "in a row."

Oral argument based upon all that McCloy had put together took place before the Commission in late 1938. By early 1939, when it was clear that the Commission was going to rule in favor of the claimants, the German commissioner "retired." The remaining commissioners then awarded approximately $50 million in damages. Certain of the claimants (again, led by Chase) sought to contest the ruling in federal court. In 1941, the U.S. Supreme Court rejected that challenge. McCloy's decade-long crusade had been justified.

Postscripts

- Amos Peaslee received $4.4 million as a result of the Commission's ruling. McCloy's partnership income was substantially increased in 1941 to $94,105.
- McCloy's Black Tom crusade made him, in Secretary of War Henry Stimson's eyes, the perfect man to help him, first as a consultant on intelligence matters and soon thereafter as Assistant Secretary of War. In that latter position, McCloy was at the heart of many of WW II's most controversial events (e.g., the internment of Japanese Americans, the decision not to bomb the Nazi death camps, saving Patton's career, the dropping of the atomic bomb on Japan, etc.).
- McCloy's father died when he was six. Because he left no insurance, McCloy's mother was forced to go to work as a hairdresser. Through force of will, she ensured that her son got a first rate education (Amherst, Harvard Law School). Among the odd jobs he took on to make ends meet, McCloy taught John D. Rockefeller Jr.'s children how to sail in Seal Harbor, Maine.
- After completing law school, McCloy returned to his home city, Philadelphia, and sought out an old friend of his father's, who was also the undisputed dean of the Philadelphia Bar: George Wharton Pepper. Pepper gave it to the ambitious, young McCloy straight:

  > [I] am not wrong about this. I know Philadelphians. It is a city of blood ties. You have good grades, but they

don't mean anything here. Family ties do…. [T]hey'll never take you seriously in this town. In New York, however, your grades will count for something.

And so McCloy accepted a job offer at Cadwalader, Wickersham & Taft. A few years later he joined Cravath, where he subsequently made partner. After the war, McCloy was unable to come to terms with Robert Swaine, Cravath's managing partner, and joined Milbank instead, adding his name to the masthead.

- The starting point for John McCloy is Kai Bird's definitive biography "The Chairman: John J. McCloy, The Making of the American Establishment" (Simon & Schuster 1992). Also not to be missed is Walter Issacson and Evan Thomas' "The Wise Men: Six Friends and the World They Made" (Simon & Schuster 1986). An excellent work on the Black Tom explosion is Jules Witcover's "Sabotage at Black Tom" (Chapel Hill Press 1989).

A Personal History

The Way We Were

By Pete Eikenberry

Next year it will be 50 years since the day after Labor Day 1963 when I took my résumé to "walk in the door" at New York law firms. Sullivan & Cromwell and the seven other firms whose names my friend, S&C associate John Broadbent, wrote on the back of an envelope were located within a three minute walk of each other — either on Wall Street or in the Chase Bank building. They were Dewey Ballentine, White & Case, Mudge Rose, Davis Polk, and a few others that I did not have time to visit in the two days that I had given myself.

Between the time that White & Case extended me an offer in September — which I accepted, subsequently reporting for work on January 2, 1964 — John Kennedy had been assassinated and the world had changed. Yet, there was virtually no change at White & Case. I joined a class at White & Case that had no women, no blacks, no Hispanics, and no Jews. The salary was $7,200 and the rent for Sue and me for a two bedroom apartment in Brooklyn — 15 minutes away by subway — was $165 per month.

At White & Case, the newer associates' memos were typed in a steno pool, yet most of the partners' secretaries sat idle much of the day on many days. The pool typists typed five copies at one time with carbon paper. There were no faxes, no copy machines, and certainly no email or even paralegals. As I gained good relationships with some of the partners' secretaries, as a favor, they often typed my memos, and with virtually no errors. We could charge our dinner if we worked late, but the limit was $5.

Though we billed our time, there were no requirements as to time to be billed. The Texas Gulf case — a very big case that went to trial a year after the SEC brought it — was staffed full time with only three young associates. The two partners on the case were very part time prior to trial. Three or four really nice guys were notorious "workaholics," Ed Wolfe in antitrust, Jim Baeclie in corporate, and P.B. Konrad Knake in litigation. I do not recall there being such a term as "pro bono" or any billing category for it. Through a White & Case buddy, I got the right to purchase Knicks season tickets, and I split the games with my friends. The Knicks became the kings of New York. Walt Frazier and his friends conspicuously drove around Manhattan in his Rolls, with Frazier wearing a fur coat and broad brimmed "Clyde" hat.

Partner Bill Conwell helped me to negotiate the purchase of our brownstone in 1967 and the firm's long time client, Bankers Trust, gave me a $12,000 mortgage on a $23,500 home purchase in Fort Greene. The seller took back a second mortgage of $8,000 and my father-in-law loaned us $3,500. We had income from three apartments, which for years I did not know were rent controlled, since I represented myself in the purchase.

Meanwhile, the Viet Nam War was escalating, the Civil Rights movement was coming of age, within a year or so the women's

movement was bringing women lawyers into the firms, and many of us were pioneers buying cheap homes in Brooklyn. By the time I had volunteered as a civil rights lawyer in Mississippi in 1966 and had run for Congress on an anti-war platform in '68 and '70, even rather conservative young Wall Street law partners were sporting hair to their shoulders or sometimes ponytails.

As I became more sophisticated politically, I drank beer at the Lion's Head on Christopher Street in the Village, where I heard stories from or talked politics with Pete Hamill, Norman Mailer, and other writers or reporters, both male and female. The Lion's Head was a self-styled "adult bar" with no TV and no juke box. I got an autograph there once from Phil Jackson — then an awkward, broad shouldered, raw boned rebounder for the Knicks. On another occasion, I joined Village Voice Editor Mary Nichols in talking to Gene McCarthy. Pete entertained us with his version of a call from the Nixon White House to attempt to enlist his support for the president's re-election. In his newspaper columns, Pete had been championing the political significance of the "white working class." Governor Hugh Carey's staff writer Roberta Copper informed us that Carey had told her that the latest speech she had written for him was great but "went out like the tide at the end."

With President Johnson, not only came the enactment of major civil rights legislation, and the escalation of the Viet Nam War, but also the "War on Poverty." A welfare recipient mother, Oscella Davis, spearheaded my election to the Fort Greene Community Corporation board. Its meetings were struggles between "black power" board members, three Hispanics, and a do gooder white board member versus regular Democratic board members looking to use the agency for patronage jobs. The meetings usually lasted to the wee hours of the morning.

I joined a class at White & Case that had no women, no blacks, no Hispanics, and no Jews. The salary was $7,200 and the rent for Sue and me for a two bedroom apartment in Brooklyn — 15 minutes away by subway — was $165 per month.

Meanwhile Sue and I had a third child, our daughter, on election night in November 1966. Though we were an extremely diverse constituency in serving as McGovern delegates in 1972, I do not recall pot smoking being much of a part of the goings on either before or at the convention in Miami. However, in the 10 years from 1962 to 1972, there was a lot of booze and, of course, we had "the pill" and the sexual revolution was flowering. Other than war casualties, marriages were the first major casualties of a period when all the movements were in full bloom. "Trick or treat" night in those days was a "return of the father's night" as separated and divorced dads returned to escort their children in Brooklyn Heights. I escorted ours there too since trick or treating was too dangerous in Fort Greene.

Only in retrospect can the toll be counted of deaths, losses of careers, and destroyed families due to alcoholic excesses. A substantial percentage of the "best and brightest" from my classes in law school and at White & Case had their lives decimated by booze, *e.g.*, a suicide in a fleabag hotel near South Station, Boston, a disbarment in Ohio, and a wife-beating divorce in California. A few survived by joining AA, and others made do with a less than happy life. Some even had major career successes. We toughed it out and, for the most part, we neither were offered help — nor sought it.

Looking back, a cadre of lawyers who joined the bar in the decade 1963 through 1972 did a lot of good and we have a lot of heroes. The fact that we even survived so many exciting distractions is a testament to American tolerance for chaos during changes in the status quo. To our credit, we were mostly believers, not cynics. Yet, how most kept practicing law and earning a liv-

ing is something I wonder about, especially in my own case. Sue wonders as well.

FBC News

Public Service Committee Co-Founds Asylum Representation Project

By Jamie Levitt, Alida Lasker and Jennifer Brown

In 2007, Second Circuit Judge Robert A. Katzmann, delivering the Marden Lecture at the Association of the Bar of the City of New York, challenged members of the legal profession to exercise our exclusive privilege and license to practice law by addressing the unmet needs of the immigrant poor, "a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear."

Lacking any right to government-provided counsel, most immigrants facing removal (i.e., deportation) proceedings must navigate the labyrinth of immigration law and procedure without any legal assistance. The stakes are high for all immigrants in removal proceedings, but are at the extreme for indigent asylum seekers who could be subjected to death, torture or other forms of persecution if they are forced to return to their home countries. Securing legal representation makes all the difference: according to a recent Stanford Law Review article, in 2007, for instance, only 16 percent of unrepresented asylum seekers won asylum, but that number rose to 46 percent for those with counsel and 96 percent for those represented by pro bono law firm lawyers who worked in conjunction with immigration legal service providers such as Human Rights First.

Asylum Representation Project and Leon Levy Fellowship

Heeding Judge Katzmann's call to action, the Federal Bar Council's Public Service Committee ("PSC") and the Katzmann Study Group were determined to respond. In an article in the Fordham Law Review, Immigration Judge Noel Brennan, a member of the PSC and the Katzmann Study Group, stressed the need for a concrete strategy to increase legal assistance for oft-forgotten immigrants with asylum claims. Committee members grappled with who could represent newly identified asylum seekers, recognizing that immigration legal services providers are severely over-stressed. After extensive consultation with Lori Adams, who is Managing Attorney in the Refugee Protection Program at Human Rights First, the PSC joined with Katzmann Study Group members, the immigration judges, and other stakeholders to design an innovative partnership: a new screening program at the Immigration Court that directs cases to a new fellowship attorney at Human Rights First, who is assisted by a dedicated cadre of pro bono attorneys from five participating firms.

Judge Katzmann, whose vision and leadership inspired this project, announced the formation of the Asylum Representation Project and the new Human Rights First fellowship at a May 2011 Cardozo Law School Symposium entitled *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, and the project got underway in the fall of 2011. The Fellow, who is generously funded by the Leon Levy Foundation, is a full time attorney at Human Rights First.

How the Project Works

The Asylum Representation Project offers free monthly screenings of potential asylum seekers in on site facilities provided by the New York Immigration Court. With strong backing from the Immigration Court, immigration judges are encouraged to refer indigent litigants who appear to have viable asylum claims to these screenings. The Leon Levy Fellow conducts the screenings with assistance from attorneys at the participating firms. People with potentially meritorious cases are referred to Human Rights First, where the Fellow interviews them at length. Once a person with a solid claim to asylum has been identified, the Fellow places that asylum seeker with pro bono counsel, at the participating law firms if possible.

Who Is Involved

Immigration Judge Brennan and the Immigration Court's Pro Bono Committee were consulted on the design and implementation of the project, thus ensuring that those developing the ARP understood the practical workings of the Immigration Court and the needs of the immigrants who appear before it. Now, Judge Brennan, the Pro Bono Committee, Court Administrator Star Pacitto, and Assistant Chief Immigration Judge Robert D. Weisel keep the Immigration Judges up to date on the ongoing availability of ARP screenings at the court.

Five participating law firms — Morrison & Foerster, Cleary Gottlieb Steen & Hamilton LLP, Fried Frank, Harris, Shriver & Jacobson LLP, Sullivan & Cromwell LLP and WilmerHale — staff the screening days and, as far as practicable, accept asylum cases offered to them by Human Rights First.

The inaugural Leon Levy Fellow at Human Rights First is Gina DelChiaro, a former litigation associate in Sidley Austin LLP's New York office who developed an expertise in asylum law through her dedication to the firm's pro bono practice. Ms. DelChiaro, herself under the supervision of Lori Adams, trains and supervises the screening attorneys from the participating firms, who are now also beginning to assist with intake interviews at Human Rights First. Alida Lasker (Associate, Cleary Gottlieb LLP) assisted in creating the ARP and Leon Levy Fellowship and now serves as the ARP's PSC Law Firm Coordinator, helping to conduct trainings and manage staffing for the pro bono law firm attorneys involved.

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Successes to Date

Since the launch of the Asylum Representation Project in the fall of 2011, there have been 12 screening sessions, all of which have taken place in the Pro Bono Room at the Immigration Court at 26 Federal Plaza in Manhattan. Noting that, "We all have a stake in this project's success," Judge Brennan praised Ms. DelChiaro for putting her "whole heart and soul" into the ARP. That extraordinary dedication has enabled the ARP to provide legal consultations to more than 100 pro se immigrants. To date, the program has accepted 24 cases of clients from 14 different countries.

Twelve of those cases were placed with the five participating firms from the PSC. The project has placed a total of 20 cases with 11 different law firms. Currently, the ARP cases are pending before 15 different judges at the New York Immigration Court. Because immigration cases are normally pending for a long time — in large part because the immigration courts are overloaded with cases — it may be some time before the ARP can measure success in terms of people granted asylum. But with such committed and talented attorneys involved, success is only a matter of time.

Hopes for the Future

The PSC is committed to ensuring that the ARP and the Leon Levy Fellowship continue to thrive and grow over time to provide quality legal representation for more indigent asylum seekers. In addition, all parties involved would like to see this project replicated in other areas of immigration law where there is an equally pressing need for pro bono representation. For example, detained immigrants in New Jersey and upstate New York have little or no access to counsel. There is also a great unmet need for representation of people in immigration court seeking cancellation of removal, a form of relief from deportation based on the length of time an immigrant has lived in the United States and hardship that would be caused to United States citizen immediate relatives — especially children — who could be abandoned if the immigrant is removed from the country.

Initiatives similar to the ARP and Leon Levy Fellowship, which draw together the resources of philanthropic organizations, legal services providers, bar associations, and law firms, could make great strides toward addressing the unmet needs of unrepresented indigent immigrants in these very situations.

FBC News

Campaign Finance

By David Siegal

On October 11, 2012 — three weeks before Election Day — U.S. District Judge Paul A. Engelmayer moderated a lively and entertaining panel debate at the Daniel Patrick Moynihan U.S. Courthouse. The program, entitled "Freedom Applied: How Is the American Democratic Process Faring in the Wake of *Citizens United*?," focused on the past and future of U.S. campaign finance reform and the freedom and accessibility of the American political system

The panel members covered the full political spectrum and brought together perspectives of practitioners and scholars alike with expertise in campaign finance, election law and First Amendment issues. The panel members included First Amendment advocate Floyd Abrams of Cahill Gordon & Reindel LLP, who recently represented Senator Mitch McConnell (R-KY) as *amicus curiae* in the *Citizens United* case; Zephyr Teachout, Associate Law Professor at Fordham Law School, whose work on the history of corruption was cited in both the concurrence and dissent of *Citizens United* and who was the Director of Online Organizing for Howard Dean's 2008 presidential campaign; Craig Engle, founder of the Arent Fox Political Law Group and former General Counsel of the National Republican Senatorial Committee; and Joseph Sandler of Sandler, Reiff, Young and Lamb, P.C., former in-house General Counsel of the Democratic National Committee.

The panel members covered the full political spectrum and brought together perspectives of practitioners and scholars alike with expertise in campaign finance, election law and First Amendment issues.

At the outset, Judge Englemayer provided a quick, humorous, and educational history of federal law aimed at ridding the political process of the corrupting influence of money and special interests, and the interplay with First Amendment jurisprudence. He began with a surprising anecdote about how, before George Washington became the country's first president, he learned a hard lesson by losing, at the age of 23, his initial run for office in a landslide to a rival who handed out alcoholic spirits to the electorate. Three years later, Honest George won a seat in Virginia's House of Burgesses in 1755 by distributing an impressive array of spirits to the voters: "28 gallons of rum, 50 gallons of rum punch, 34 gallons of wine, 46 gallons of beer, and two gallons of cider royal."

Judge Engelmayer then outlined the growth in the cost of campaigning for office. He noted that in 1928, the Democratic Party's presidential nominee, Al Smith, spent $7.6 million in a losing campaign, and in 2008, President Barack Obama, spent a record $740.6 million in his winning effort to capture the White House. This expansion came despite various Congressional efforts to limit campaign contributions and/or spending, install reporting requirements, and restrict so-called "electioneering communications," to avoid either actual corruption or its appearance. Supporters of these laws argue that unrestricted campaign contributions or spending give wealthy individuals and groups an outsize influence over election outcomes; serve to drown out the voices of less well financed candidates and their supporters; and create conflicts of interest for a candidate once in office. Opponents question the wisdom or efficacy of these restrictions, and view them as direct threats to freedom of political expression

and First Amendment rights.

Judge Englemayer reviewed the campaign finance history, from the 1883 Pendleton Act, which forbade mandatory assessments on civil servants and created the professional civil service, to the 1947 Taft-Hartley Act, which barred unions and corporate contributions to federal candidates (which President Harry Truman called a "dangerous intrusion on free speech" as his veto was overridden), finishing with the McCain-Feingold reforms that were challenged in the 2010 *Citizens United* case.

The panel discussion began with Floyd Abrams, who expressed surprise at the vehemence of the criticism leveled at the Supreme Court, given what he characterized as the deep tradition in U.S. jurisprudence of placing political speech at the core of the First Amendment. In his view, the *Citizens United* decision was both wholly justified and entirely consistent with that tradition.

In contrast, Professor Teachout challenged the notion that the early history and philosophy of the American political tradition even treated the First Amendment as relevant to protecting the integrity of the electoral process. In her opinion, anti-corruption and expansion of access to the political process for the general public, arising from the philosophy of Montesquieu were the more relevant historical traditions. She called the Court's recent emphasis on the importance of the First Amendment a "fetishization," like those of earlier periods of Supreme Court focus on clauses such as the Contracts Clause or "substantive" Due Process.

With regard to the free speech rights of corporations, Abrams reminded the audience that the Court had long protected such rights, especially those of media companies (as in the Pentagon Papers case). Teachout argued that extension of media companies' special rights, which are premised on their perceived role as the "fourth estate," to non-media entities could not be justified by precedent, and arguing that corporations are legal fictions, unvested with constitutional rights.

Craig Engle reminded the audience that much of the handwringing over the *Citizens United* decision arose from the fear that large corporations would be free to make large contributions to SuperPACs, without considering their corporate mandates or shareholders' wishes. However, corporate contributions have been rare in the wake of the decision. He attributed that trend to executives' aversion to offending customers whose politics were uncertain at best. Joe Sandler replied that recent experience in the wake of *Citizens United* was no indication of the ruling's ultimate result, or whether corporations would seek to take their new freedoms in the future.

During the discussion, the panel covered a variety of issues, including the future of anti-corruption initiatives requiring greater disclosure and shareholder approval of corporate spending; the fate of public financing of elections; the overlap between campaign finance laws and anti-bribery jurisprudence; the changing roles of political party machines; and the long term effects of new technology on the evolution of the debate.

The Contest

Oops!

As of 1997, SmithKline Beecham ("SKB") had for many years been selling a douche product under the brand Massengill. After developing a new nozzle, it conducted a clinical study to demonstrate that its brand was more effective than the leading competitor, marketed by Fleet (the Summer's Eve brand) — yes, the same company that is widely known for its enema.

Fleet promptly hired the Arent Fox law firm to file a Lanham Act false advertising lawsuit and seek a temporary restraining order. I was hired to represent SKB. The lawsuit was filed in federal court in Roanoke, Virginia, near Fleet's corporate headquarters. Within a few days we found ourselves in front of the Honorable James Turk, who suggested that he would defer entering a temporary restraining order if we would agree to withdraw the ad pending a prompt hearing on the merits. Naturally, we did what his Honor suggested.

This was followed by expedited discovery, during which I had the opportunity to meet with

Dr. Morris Shelanski, from Conshohocken, Pennsylvania. Dr. Shelanski had conducted SKB's clinical study, called the "Blue Dye" study.

One week before trial, I received a call from local counsel who advised that Judge Turk was empanelling an advisory jury. I was told that Judge Turk preferred to try cases with a jury present, whether or not required. During jury selection I knew that I was in unfriendly territory. In voir dire several of the jurors expressed how they were highly skeptical of advertising claims. This was also a "fundamentalist" area.

On the morning of the second day of trial, Dr. Shelanski took the witness stand. Direct went well, followed by what seemed to me to have been an extremely long, boring cross-examination, as my adversary tried to wear the good Dr. Shelanski down. He certainly wore me down — I struggled to stay awake in an extremely warm courtroom. All of a sudden, as I was nodding off for the tenth time, the magic words came: "No further questions." I snapped to attention, looked at the clock, saw that it was almost lunch time, and decided that I needed to make a very brief but dramatic redirect. I shot forward into the well of the courtroom, formulating a question as I moved towards Dr. Shelanski. There had been an enormous focus during cross on various aspects and physical characteristics of a woman's vagina. My first question on redirect was directed at the nature of the vagina as an organism….

I struggled to stay awake in an extremely warm courtroom. All of a sudden, as I was nodding off for the tenth time, the magic words came: "No further questions." I snapped to attention, looked at the clock, saw that it was almost lunch time, and decided that I needed to make a very brief but dramatic redirect.

Unfortunately, the word organism came out as "orgasm." I didn't realize this until a stunned Dr. Shelanski literally shouted "What did you say?" There was three seconds of total silence, followed by extremely loud, convulsive laughter from all over the courtroom. The jury went absolutely nuts. On at least three occasions, Judge Turk pulled himself together, got everybody back to being serious, and then cracked up again. There was, of course, no proverbial hole in the courtroom for me to crawl into.

When the trial was over the jury ruled against us in less than 15 minutes. Afterwards, our local counsel interviewed the jurors who were willing to talk, and I was far and away voted the lawyer they liked the most ("that guy from New York was great"). Several months later, Judge Turk ruled in our favor, paying no attention to the jury verdict. Fleet appealed, and the Fourth Circuit affirmed. *C. B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3 430 (4th Cir. 1997).

The Contest

A Night to Remember

By I. Stephen Rabin

A burnt out case. That was what I had become in 1964, after a six year diet of prospectuses and underwriting agreements as a young associate at a corporate law firm. I needed a change.

Despite having no clients I decided to go out on my own. I rented an office from William Power Maloney, a high profile criminal defense attorney. Maloney was short, able, fiery, and fearless. When a judge chided him for being disrespectful, he responded that he respected the office but not the man.

Before I had even become settled, Maloney asked me to assist him in representing Joe Bonanno, the head of the Bonanno crime family, who was to appear before a Grand Jury in Foley Square the very next day. Joe Bonanno was dubbed Joe "Bananas" in the tabloid press. Joe despised the name.

Maloney warned me against mentioning bananas in Joe's presence as in banana split or top banana.

That evening Maloney and Joe Allen, another lawyer who rented space from Maloney, and a mysterious Texas lawyer whose name I never learned, met Joe Bonanno at Bruno's Pen and Pencil, a mob-connected steak house in the East 50s.

Joe turned out to be the epitome of a prosperous middle class business man: affable, courteous, well spoken with rimless glasses and the faintest of Italian accents, which only added to his dignity. After dinner, as we were leaving, Joe Allen stopped Bonanno and said, "Stay here, Joe, let me see if the coast is clear." Allen went outside, looked up and down the street, and indicated that it was safe to go. The Texas lawyer excused himself to go to the men's room and never reappeared.

I almost laughed out loud. To me the dialogue was strictly out of a Grade B, no, Grade C, detective movie. Everyone seemed to be playing a part. We all piled into a cab and headed for Maloney's Park Avenue apartment. Joe was to sleep over that night at Maloney's and the two of them would meet Joe Allen and me at the court house the next day. That meeting never happened.

We got out of the cab in front of Maloney's apartment building and Joe Allen went inside. Two very large men materialized out of the darkness, grabbed Joe Bonanno by the shoulders and began dragging him down the street like a rag doll. One of them said "Come on, Joe, our boss wants to see you." More Grade C dialogue. Paralyzed and disbelieving, I felt I was watching a bad movie. Maloney, a lawyer to the core, ran after them, shouting "You can't do that, he's my client!" One of the very large men then turned around, took out a very large pistol, aimed it at Maloney, and fired two shots up Park Avenue. They threw Joe into a waiting limousine, motor running, lights out, and drove off into the night. The whole thing had lasted two or three minutes.

After dinner, as we were leaving, Joe Allen stopped Bonanno and said, "Stay here, Joe, let me see if the coast is clear." Allen went outside, looked up and down the street, and indicated that it was safe to go.

The movie was over.

Or was it? The next day, newspapers and television had a field day, "Gangster Snatched! Shots Fired! Morgenthau promises full investigation!" I was identified as one of Bonanno's lawyers. My mother called, warning me not to associate with such low class hooligans.

It was generally believed that the kidnapping had been staged so that Bonanno would not have to appear before the Grand Jury. Law enforcement was out for blood.

I appeared before a Grand Jury in Foley Square. I declined to answer most questions, claiming attorney-client privilege. I was also questioned by a N.Y. City detective and claimed the same privilege. Then I was summoned to see U.S. attorney Morgenthau. He said that Maloney would soon be indicted and that I should not destroy my career by refusing to come clean about the kidnapping. I remained silent.

As things turned out, Maloney was not indicted and Joe Bonanno never appeared before the Grand Jury, but did emerge from his kidnapping months later, refusing to talk about his absence.

Bonanno never contacted us again and no one ever received a fee. Just another day at the office. But the question remains: was the kidnapping staged? As to that, my lips are sealed.

The Contest

My Strangest Courtroom Experience

By Gary S. Klein

During voir dire in a case involving a horrific environmental incident in which a home heat oil truck overturned onto a residential property, I had occasion to peer into the mind of an unusually candid prospective juror. In Con-

necticut Superior Court, we have unlimited individual voir dire. Lawyers have the right to spend hours questioning prospective jurors to gain insight into the person's biases, thought processes, and approach toward jury service. The facts of my case were that a home heating oil truck driver, in a rush to complete his route on a cold Saturday morning, was driving too fast to negotiate a sharp left turn. The truck, freshly filled with 3,000 of heating oil, flipped over, ruptured, and polluted a drinking water watershed and a residential property.

During voir dire, a single woman in her mid-twenties politely answered questions about her history with the court system, her employment and interests. I asked the woman whether she had any particular feelings or views about oil companies, home heating suppliers, or other fuel suppliers. She said "no." I then asked whether she had any feelings about or opinions of truck drivers. She blushed, paused, and started laughing. When I asked her why she had laughed and hesitated, she stated that she thought that men who delivered goods to homes were "wild." She went on to say that she had had no troublesome experiences with delivery men, but that she had several female friends who had. When I asked her to explain what type of experiences about which she had heard, she replied "you know, the milk man fantasy…." and started to laugh again.

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No matter how hard I tried, I was incapable of understanding her reference. Perhaps I was nervous, caught in the professional moment, or just plain naïve. Rather than accept her answer and move on, I pressed further. "Can you explain what you mean," I said, "I do not understand your concern." She paused, drank some water, and said "you know…a woman is home alone…and the delivery man comes to the door…and they end up becoming romantic, in an anonymous, single encounter." The light finally went on in my head. It took me 10 or 15 minutes to understand this woman's views about delivery men, but I finally got it. I then turned to my adversary and said, I have no further questions of this venire woman, you may inquire. He politely said "I have no questions."